90-562

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MONICA GETZ,

Petitioner,

vs.

STANLEY GETZ,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

WHITNEY NORTH SEYMOUR, JR.
Attorney for Petitioner
100 Park Avenue, Room 2606
New York, New York 10017
(212) 599-0068

QUESTIONS PRESENTED FOR REVIEW

1. Does New York State's matrimonial law, which permits abusive husbands to bring plenary suit against abandoned wives and impose the crippling economic burden of legal fees and expenses, discriminate against women in violation of the due process and equal protection provisions of the Fourteenth Amendment?

The New York Court of Appeals denied petitioner's motion for leave to appeal this question.

2. Does New York State's Domestic Relations Law, which permits a husband to sue his wife for divorce based on her alleged adultery, but bars evidence of the husband's admitted adultery before the trial jury as a defense, violate constitutional due process and equal protection guarantees?

The New York Court of Appeals denied petitioner's motion for permission to appeal this question.

3. Is it a deprivation of constitutional due process and equal protection for an intermediate state appellate court to summarily dismiss an appeal on substantive grounds, without full briefing and oral argument, where there is a statutory appeal as of right?

The New York Court of Appeals denied petitioner's motion for permission to appeal this question.

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Monica Getz petitions for a writ of certiorari to review the order of the Court of Appeals of the State of New York denying her motion for leave to appeal the Appellate Division's summary dismissal of her appeal from the final judgment in a divorce action instituted against her by her husband in 1981.

OPINIONS BELOW

The order of the Court of Appeals of the State of New York, entered on July 2, 1990, (not yet reported) (App. A) denied petitioner's motion for leave to appeal the summary dismissal of Mrs. Getz's (defendant below) appeal from the final judgment of divorce to the Appellate Division, Second Department, entered

on December 7, 1989 (App. B). The Appellate Division also denied petitioner's motion for reargument or, alternatively, for permission to appeal to the Court of Appeals by order entered on February 5, 1990 (App. C). The judgment of the New York State Supreme Court, Westchester County, granting divorce, was entered on October 7, 1987 and the judgment on the financial issues and dismissing petitioner's defense of recrimination was entered on March 10, 1989.

JURISDICTION

This petition for certiorari is from a final order of the New York State Court of Appeals entered on July 2, 1990, denying petitioner's motion for leave to appeal the order summarily dismissing petitioner's appeal from final judgment in the divorce action to the Appellate Division, Second Department, entered on December 7, 1989. 28 U.S.C. Section 1257 (3). The summary dismissal, which the Court of Appeals refused to review, raises federal constitutional issues.

PROVISIONS INVOLVED

Due process and equal protection clauses of the Fourteenth Amendment:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 170 of the New York State Domestic Relation Law:

§ 170. **Action for divorce**

> An action for divorce may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on any of the following grounds:
>
> (1) The cruel and inhuman treatment of the plaintiff by the defendant such that the conduct of the defendant so endangers the physical or mental well being

> of the plaintiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant;
>
> . . .
>
> (4) The commission of an act of adultery. . . voluntarily performed by the defendant, with a person other than the plaintiff after the marriage of plaintiff and defendant. . . .

Section 171 of the New York State Domestic Relation Law:

§ 171. **When divorce denied, although adultery proved**

> In either of the following cases, the plaintiff is not entitled to a divorce, although the adultery is established:
>
> . . .
>
> 4. Where the plaintiff has also been guilty of adultery under such circumstances that the defendant would have been entitled, if innocent, to a divorce.

Section 173 of the New York State Domestic Relation Law:

§ 173. **Jury Trial**

> In an action for divorce there is a right to trial by jury of the issues of the grounds for granting the divorce.

STATEMENT OF THE CASE

This petition challenges the constitutionality of New York State statutes relating to divorce actions, as well as the denial of appeal rights in violation of the due process and equal protection guarantees of the Fourteenth Amendment.

The principal issue raised by this petition is the gender bias of the New York State statute which permits removal of divorce proceedings from the specialized Family Court, at what amounts to the husband's option, to a commercial court where the husband can engage in prolonged, vindictive litigation until his wife's limited resources are depleted and she is forced to capitulate on

the most unreasonable demands. This case has been pending in such a court for nine years, forcing the wife to incur unpaid legal bills of over $600,000, now constituting a lien on the family home which must soon be sold to satisfy creditors, leaving her after 25 years – as a housewife and mother – with no rental income source or family base for her and her children and grandchildren during her mature years.

The petition also challenges the gender bias of the New York State statute which permits a husband to seek a divorce on grounds of adultery allegedly committed long after he had abandoned his wife to move in with someone else, and allows the trial jury to hear evidence only relating to the wife's alleged adultery and not of the husband's admitted adultery, even though such adultery constitutes a complete defense to the husband's claim. In this case, the trial judge instructed the jury to consider the wife's adultery on both of the grounds on which the husband sued for divorce (adultery and cruelty) while postponing separate consideration of the husband's adultery until after the jury verdict. The statute permitting this discrimination is a plain denial of due process and equal protection in the context where husbands are given the statutory advantage of initiating jury trial divorce proceedings when they decide to shed their wives.

Finally, this petition challenges the drumhead justice meted out to petitioner by the appellate courts of New York State in this case. Petitioner duly filed her appeal from the final judgment in the divorce action and concentrated her appeal on the due process issue of allowing the trial jury to hear evidence of her alleged adultery but not that of her husband's (discussed above). The appellate court refused to hear the case, and dismissed it instead on motion of the husband, based directly on the main substantive question raised on the appeal. This summary disposition of the controlling issue on an appeal to which the petitioner was entitled as of right was in total violation of her equal protection guarantees and must be set aside.[1]

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[1] The federal constitutional question in Question No. 1 *supra* was raised in the New York State Court of Appeals in Mrs. Getz's motion for leave to appeal from the Appellate Division's summary dismissal of her appeal from the Judgment

(Footnote continued)

The Facts

Stanley and Monica Getz were married on November 3, 1956. She was 21 years old. It was her first marriage, his second. She undertook to raise her husband's three small children, who were facing court custody because of their natural mother's alcoholism, drug addiction and subsequent abandonment, and their father's recent six-month jail sentence for a drug-related armed robbery and subsequent suicide attempt.

Stanley Getz was bankrupt, with a suitcase full of unpaid bills and creditor demands. He was in trouble with the IRS for having spent the withholding taxes of his musician/employees, and never having filed returns or paid taxes. He had no home of his own, no furniture, and his relatives were taking turns caring for his small children.

Monica Getz set up housekeeping with the youngsters in a one-bedroom apartment in the Bayside, Queens home of her husband's parents. Later the couple moved to a rented house in Great Neck, where for the first time the children attended school regularly and began to taste a healthy family life. Monica helped her

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of Divorce, in the Conclusion of the Brief at p. 30: "This case stands as a monument to the potential for abuse of New York's matrimonial laws. In this one case legal fees of an estimated one million dollars have been run up because the legal establishment knows only one way to deal with marriages where the husband decides to leave his wife – let the parties fight it out until their resources are eaten up by lawyer's fees. Then sell the family home to pay off the lawyers, and leave the abandoned wife not only without a home, but also without financial security or faith that there ever was such a thing as justice in the judicial system." Question No. 2 was raised in the same motion. *Id.* at p. 30: "The New York court system has allowed itself to be used to generate huge legal fees over false and distorted accusations while denying the most basic due process rights to the abandoned wife – rights which the courts jealously guard for murderers, narcotics pushers, muggers and rapists." Question No. 3 was also raised in the motion to appeal *Id.* in the Statement of Questions Presented for Review at p. 1: "Does the summary dismissal *on the merits* of an appeal as of right directly affecting marital status, without oral argument or full briefing on the issues, violate the Judiciary Article and due process guarantees of the New York State Constitution and the Fourteenth Amendment of the United States Constitution?" *See also* Point I of that Brief, headed: "STATE AND FEDERAL CONSTITUTIONAL GUARANTEES REQUIRE THAT WHEN AN APPEAL IS AFFORDED UNDER STATE LAW IT CANNOT BE GRANTED TO SOME LITIGANTS AND ARBITRARILY DENIED TO OTHERS"

husband get back the cabaret license that had been withdrawn when he was jailed, so he would be allowed to work in New York to be near his family.

To get away from the worsening drug scene, Stanley and Monica moved to Denmark. In 1961, Stanley Getz succumbed to the pull of the music in New York and the couple returned and lived in a series of rented houses. The settlement with the IRS, reached in the meanwhile, took most of their net income.

In 1966, using funds supplied by her family, the couple purchased "Shadowbrook," a rambling house near the Hudson River in Irvington, New York, where their five children (three by the former wife; two by Monica) were raised. Shadowbrook has remained the family home ever since, supported by the rent derived from tenants and a bed-and-breakfast operation. For 25 years, Monica kept the Getz home going, raised and educated the children, ran the household, managed the property, and served as her husband's business manager and promoter, for all of which she received no compensation.

By the late Sixties, it was apparent that Stanley Getz – who had, with his wife's help, achieved international musical and financial success as a jazz saxophonist through concerts, television appearances and recordings – was switching his dependence from drugs to alcohol. He grew unpredictably violent. Many of his professional relationships were destroyed. His children were alienated emotionally and, at times, abused physically.

Monica persuaded her husband to undergo treatment at the Hazelden Foundation in Minnesota, a leading alcoholism treatment center, and accompanied her husband there for what was to be a protracted period. At Hazelden, she was taught not to accept abuse and violence, that addiction and the resultant behavior is a treatable disease, and that a protective court order could not only shelter the family but provide leverage for treatment in the event of relapse. On Hazelden's recommendation her husband became the patient of Dr. Ruth Fox, who prescribed Antabuse, a drug that induces an allergic reaction when ingested with alcohol, and instructed Monica – with her husband's approval – to put Antabuse routinely in his orange juice. Stanley

later employed many varied ruses to avoid taking Antabuse whenever he decided to resume drinking.

Stanley Getz's drinking bouts became infamous. More than once he went berserk in the house, forcing his family to flee to the safety of a hotel, sometimes in the middle of the night. Refusing to change his lifestyle, he withdrew all his funds and disappeared to England and then to Spain, leaving his family to fend for itself, at which point Monica took the children to her family's home in Europe in an attempt to continue their education in peace.

Stanley Getz bottomed out in Spain, broke and abandoned by a series of young female companions. He telephoned Monica and their youngest daughter to come rescue him. Removed to England, he slowly recovered at the Greenway Nursing Home in London and resumed taking Antabuse. But when Monica went off to Sweden to arrange for their other children to join them, Stanley relapsed. He began to drink again and became increasingly hostile. The daughter realized that he was not taking his medication and secretly gave it to him in his breakfast. He had a mild physical reaction, concluded that he was allergic to alcohol, and was continued on Antabuse at Dr. Fox's urging (to prevent further violence and to facilitate his participation in AA, which he had avoided).

For most of the 1970's the husband's health, career, family life and finances flourished. The approach of the 1980's brought a new generation of young musicians to the Getz band, and with them, cocaine, on which Antabuse has no effect. Stanley was soon back on drugs.

One day while Monica and Stanley were on a family vacation in North Africa in early 1980, he — in the presence of Mrs. Getz's mother and other family members and friends — telephoned a prostitute in New York, who flew to Dakar at his expense to sleep with him. Monica left with her mother and some of the children. After being threatened physically, she then decided to obtain a protective order, file for divorce and seek a family intervention. Her objective was to bring home to her husband that

he had to take responsibility for his own health and actions. She was no longer willing to put up with his womanizing and unpredictable violence while she was struggling to protect him from the fearsome consequences of addictions that demanded professional treatment. The husband turned to a doctor friend, who minimized his problem and tried to dissuade the family from taking action. The he left on an extended concert tour, claiming everything was "under control."

Upon Stanley Getz's return in May, 1980, he verbally attacked his musicians, and then physically attacked Monica so viciously that she had to be hospitalized. He was arrested and sent by the Family Court for treatment at Hazelden. Stanley asked Monica to join him at Hazelden for a reconciliation. They then went on a European tour together, on the last day of which he again began drinking and suddenly, without provocation, tried to throw her out of a sixth-floor window. He himself then returned to Antabuse, followed by another reconciliation. The couple then made a joint trip to South America and on to Florida where they were joined for Christmas by their youngest son, who was undergoing knee surgery. On New Year's Eve, 1981, Stanley commenced drinking again, and without provocation attacked the son, who was on crutches.

An attempt at intervention was arranged in New York by the husband's then attorney. Stanley fired his lawyer from California, and said he would starve his family until they accepted the fact that "a man is entitled to drink in his own house."

The New York Family Court issued a support order. Two lawyers later, the husband was advised to institute this divorce action based on allegations that the administration of Antabuse constituted "cruelty". Subsequently the husband became a resident of California, where a low-cost, no-fault divorce was readily available without incurring high legal fees on both sides. His New York lawyers, however, persuaded him to pursue his divorce action in New York instead, where litigation is unrestricted and fees can mount astronomically, and matrimonial litigation can be converted into an instrument of revenge and persecution. (So far, the fees incurred by both sides in this case conservatively total

one million dollars which can only be paid by forcing the sale of the family home and distributing the proceeds to the attorneys.)

Still another reconciliation followed, this time in California. A financial agreement was arrived at and made the subject of a 1982 Family Court order. The husband returned to his home in New York, where he was booked for an engagement, followed by a European tour. Then came the inevitable resumption of drinking and abrupt cancellation of family plans to join him for the Easter holidays in San Francisco. Monica returned for a time to Sweden, where she founded the Council on Alcoholism and Other Drug Addiction and organized a major conference in Stockholm.

The New York divorce action was taken off the calendar for almost two years at the request of the husband's attorney while he once more attempted to overcome his alcoholism. Eventually the case went to trial in 1987, resulting in a jury verdict in favor of the husband. The proof at trial focused on Monica's administration of Antabuse and an alleged adulterous relationship between her and a family friend following Stanley's abandonment. She testified at trial that she had never been unfaithful to her husband – despite his many girlfriends. (A post-trial polygraph test has confirmed the truthfulness of her denials.) The trial judge refused to allow *any* of the evidence of *the husband's* admitted adultery to go before the jury, and instead instructed the jury they could consider the one-sided evidence of the *wife's* alleged adultery on the issue of *cruelty* – which is the specific basis for this appeal.

Monica Getz has been denied *every single attempt* to have the trial court's rulings and jury charge reviewed on appeal. The incompleteness of the court reporter's trial transcript, combined with the trial judge's refusal to settle the record on appeal, resulted in the dismissal of her first appeal. Subsequent appeals have all been dismissed on *res judicata* grounds. *Never once have the issues been considered on the merits.*

The result of this lengthy matrimonial litigation has been to force the wife to near-destitution. On January 12, 1990, the trial judge issued an order directing the Sheriff of Westchester County to execute a contract and deed to sell the family home which

is the only base her family possesses, and which is the wife's only direct source of income (from rents). Meanwhile the husband's lawyers have exploited their client's notoriety for publicity purposes. An article in the March 1990 issue of *Manhattan, inc.*, contains a lengthy profile (at pages 62-67) of the husband's attorney, Jeffrey Cohen ("the ferocious matrimonial lawyer") touting his actions in this case after he invited the magazine writer to accompany him to the New York Supreme Court in White Plains in his "chauffeured" car for "another episode in what he [Cohen] calls his most brutal piece of litigation." (*Id.* pages 65-66). The magazine writer describes Mr. Cohen's courtroom presentation seeking the wife's eviction from the Getz family home as "vintage Cohen: raging barrister with a brutal, caustic one-two combination" (at page 66). This case – and the wife's – have become public relations fodder for "the man who would be king of matrimonial attorneys" (page 62).

The wife's entire life has been left in shambles by this case. She has been branded an adulteress. She has become obligated to pay legal fees of many hundreds of thousands of dollars. She is being forced out of her home, and to give up her old age security and the children's inheritance. She has been denied the most rudimentary appellate review of an unfair trial. The course of this case has been "drumhead justice" at its worst.

REASONS WHY WRIT SHOULD BE GRANTED

Specific Legal Issues to be Addressed

1. Section 170 of New York State's Domestic Relation Law specifically permits "a husband or wife" to sue for divorce in the state's highest court of general jurisdiction. In reality, as the New York courts themselves have found, this statute predictably gives that choice overwhelmingly to husbands and denies equal access to women. The statute forces *wives* into an arena for which they rarely have sufficient resources, and where their only realistic options are capitulation or economic ruin. The statute also permits *husbands* to nullify the family protection provisions of New York's Family Court Law by the institution of plenary litigation to override the low-cost statutory mediation procedures designed to resolve family disputes without significant cost, delay and

unnecessary acrimony. Section 170 therefore violates both the due process and equal protection guarantees of the Fourteenth Amendment.

2. Sections 171 and 173 of New York State's Domestic Relations Law mandate factual determination of the *wife's* alleged adultery in a divorce action to be made by a *jury*, while the factual determination of the *husband's* alleged adultery is made by the *judge*, with no knowledge on the jury's part of the husband's misconduct while it decides the wife's fate. This arbitrary discrimination is a deprivation of due process and equal protection under the Fourteenth Amendment.

3. New York State provides an appeal as of right from a final judgment in a divorce action. Once a state creates a right to appeal by statute it must administer it without discrimination. In this case, petitioner's appeal from the final judgment in the divorce action, raising a disputed issue of law, was dismissed on motion without allowing the wife the opportunity of presenting the matter to the full bench in open court or permitting complete briefing and oral argument as provided under the State's procedural statutes and rules. This arbitrary procedure denied petitioner due process and equal protection under the Fourteenth Amendment.

ARGUMENT

POINT I

NEW YORK'S PRESENT STATUTE AUTHORIZING HUSBANDS TO INITIATE PLENARY DIVORCE ACTIONS IN THE STATE'S PRINCIPAL COMMERCIAL COURT IS A DENIAL OF DUE PROCESS AND EQUAL PROTECTION TO WOMEN

Stripped of its details, this is a case about the rights of married women in our society. It represents barbaric abuse of equal rights, permitting a husband to abandon his wife of many years; take up with a live-in girlfriend; sue the abandoned wife for divorce; force the sale of the family home; saddle the wife with huge attorneys' fees; and then throw her out in the street to fend for herself. All of this has been made possible by Section 170 of New York's Domestic Relations Law.

The fact that Monica Getz is on the verge of losing her home and being forced into near-indigence is a human tragedy caused by the inability of New York's court system to control matrimonial litigation run amuck. This case is a classic example of institutionalized gender discrimination under an obsolete system of laws established in a dark age when women were vassals.

Divorce actions, like other legal proceedings involving the family, should be administered by tribunals experienced in preserving marital assets, protecting children, dealing with substance abuse, and salvaging whatever good can be preserved in human relationships. They do not belong in the free-for-all marketplace of commercial litigation, where women and children have no champions and the rules of practice permit legal wars of attrition.

Factual Basis for Claim of Gender Discrimination

In 1984, the Chief Judge of the State of New York created a "Task Force on Women in the Courts" to investigate the existence of gender bias in the New York State Court system. The Task Force was given a broad mandate to investigate all aspects of the court system, both procedural and substantive. The Task Force was composed of a broad mix of judges, lawyers and knowledgeable laypersons.

In March 1986, the Task Force filed the report of its findings (which is published in Volume 15, page 1 of the Fordham Urban Law Journal as well as in an official volume issued by the Office of Court Administration of the New York State Unified Court System). A summary report of the Task Force findings and recommendations, which was issued simultaneously, begins with the following statement:

> The New York Task Force on Women in the Courts has concluded that gender bias against women litigants, attorneys, and court employees is a pervasive problem with grave consequences. Women are often denied equal justice, equal treatment, and equal opportunity.
>
> (Task Force Summary Report, 1986, p. i)

The 1986 report presented findings on discrimination against women in many contexts (e.g. as victims of violence, in custody cases, as attorneys, as court employees). The most significant findings for purposes of this petition were those dealing with women as parties to divorce proceedings in New York State.

The overriding conclusion of the Task Force report was that divorce causes "extreme economic dislocation" for women in New York State, contributing to a significant increase in the number of women living in poverty:

> The "feminization of poverty" – the disproportionate representation of women among New York's poorest citizens – has impelled the legislative and executive branches of government to identify causes and seek solutions. For most women, unlike men, divorce causes extreme economic dislocation and thus has contributed significantly to the swelling ranks of female single-parent heads of households living in poverty.
>
> (*Ibid.* p. 17)

The New York State Legislature "reformed" New York's divorce laws in 1980 by enactment of the "Equitable Distribution Law," which purported to give women increased rights to share in family economic resources in the event of a divorce. The Task Force found, however, that under the existing divorce system in New York State, women continue to be victims of discrimination:

SUMMARY OF FINDINGS

a. The manner in which judges distribute a family's assets and income upon divorce profoundly affects many women's economic welfare. Women who forego careers to become homemakers usually have limited opportunities to develop their full potential in the paid labor force.

b. The New York Court of Appeals has recognized that the Equitable Distribution Law embraces the view of marriage as an economic partnership in which the totality of the nonwage-earning spouse's

contributions – including lost employment opportunity and pension rights – is to be considered when dividing property and awarding maintenance.

c. Many lower court judges have demonstrated a predisposition not to recognize or to minimize the homemaker spouse's contributions to the marital economic partnership by:

(i) Awarding minimal, short-term maintenance or no maintenance at all to older, long-term full or part-time homemakers with little or no chance of becoming self supporting at a standard of living commensurate with that enjoyed during the marriage.

(ii) Awarding homemaker-wives inequitably small shares of income-generating or business property.

d. Economically dependent wives are put at an additional disadvantage because many judges fail to award attorneys' fees adequate to enable effective representation or experts' fees adequate to value the marital assets.

e. Many judges fail to order provisional remedies that ensure assets are not diverted or dissipated.

f. After awards have been made, many judges fail to enforce them.

(*Ibid.* pp. 17-18)

Section 170 was last re-enacted by the New York State Legislature in 1975. Although neutral in form, the statute is not neutral in application. It inescapably favors husbands who control the economic resources in most families by permitting them to unleash litigation blitzkriegs against their wives. When the New York Legislature re-enacted Section 170 the foreseeable impact was so disproportionately unfair to women that the burden rested on the State to establish that gender-biased considerations played no part in the legislative scheme. *Cf. Castaneda v. Partida*,

430 U.S. 482, 51 L.Ed.2d 498, 97 S.Ct. 1272 (1977); *Washington v. Davis*, 426 U.S. 229, 241, 48 L.Ed.2d 597, 96 S.Ct. 2040 (1976); *Alexander v. Louisiana*, 405 U.S. 625, 632, 31 L.Ed.2d 536, 92 S.Ct. 1221 (1972); *see generally* Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1981 Sup. Ct. Rev. 95, 123.

This Court has often questioned the purposes behind facially neutral policies by considering the degree, inevitability and foreseeability of disproportionate impact, as well as the alternatives reasonably available. *See Monroe v. Board of Commissioners*, 391 U.S. 450, 459, 20 L.Ed. 2d 733, 88 S.Ct. 1700 (1968); *Goss v. Board of Education*, 373 U.S. 683, 688-689, 10 L.Ed.2d 632, 83 S.Ct. 1405 (1963); *Gomillion v. Lightfoot*, 364 U.S 339, 5 L.Ed. 110, 81 S.Ct. 125 (1960); *Griffin v. Illinois*, 351 U.S. 12, 17 n. 11, 100 L.Ed. 891, 76 S.Ct. 585, 55 ALR2d 1055 (1956). *Cf. Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425, 45 L.Ed. 2d 280, 95 S.Ct. 2362 (1975).

The present New York State divorce statute perpetuates the obsolete, archaic status of women as vassals subject to the domination of their "lords and masters". Statutes premised on such assumptions have previously been held by this Court to be invalid. *See Orr v. Orr*, 440 U.S. 268, 59 L.Ed. 2d 306, 99 S.Ct. 1102 (1979); *Califano v. Goldfarb*, 430 U.S. 199, 210-211, 51 L.Ed. 2d 270, 97 S.Ct. 1021 (1977); *Stanton v. Stanton*, 421 U.S. 7, 14, 43 L.Ed. 2d 688, 95 S.Ct. 1373 (1975); *Weinberger v. Weisenfeld*, 420 U.S. 636, 645, 43 L.Ed. 2d 514, 95 S. Ct. 1225 (1975).

The family relationship does not belong in a forum created to resolve commercial disputes. Uncontrolled litigation, fueled by vindictiveness, abusiveness, or similar motives, should be curbed, not encouraged. Less discriminatory alternatives are available, e.g. the Uniform Marriage and Divorce Act, portions of which have been adopted in the State of Delaware, which vests the jurisdiction over divorce actions exclusively in the Family Court. Delaware Code (1974), Title 13, Section 1504. All hearings and trials are held before judges or masters experienced in family matters; costs to the parties are kept to a minimum; and the court has jurisdiction over all questions of support and custody.

In addition, Delaware's Imperiling Family Relationship Act, Delaware Code, Title 10, Section 901, permits assessment and evaluation of alcoholism, chemical dependence and other family disfunctions, and empowers the court to mandate treatment. The discriminatory nature of Section 170 should be viewed against the range of less discriminatory alternatives. *Cf. Albemarle Paper Co. v. Moody, supra*, 422 U.S. at 425. No valid governmental objectives are served by the gender-based discrimination in New York's present divorce statute.

Impact of Section 170 on this Case

When Stanley Getz was caught up in the drug culture of the music world late in the seventies, his violence escalated, and with it the risk of permanent injury to Mrs. Getz and members of their family. Mrs. Getz had no choice but to obtain an Order of Protection from New York's Family Court. In retaliation, Stanley Getz absconded to California in 1981, taking up with a live-in girlfriend, and deliberately cutting off his wife and family without any means of support. Mrs. Getz was then forced to return to Family Court for an Order of Support which was granted after four harrowing months during which she had to borrow money to buy food. Not only did Stanley Getz withdraw every moveable asset, he also instructed their insurance carrier to drop the health, life, and automobile coverage for his wife and children; to complete the purge, he cut off their credit, stopped supporting their son in college, and attempted to have their only automobile removed in the middle of night and sent to California.

In the course of expending his considerable resources to obstruct the Family Court orders, Mr. Getz hired and fired a succession of attorneys until he found one willing to institute suit for divorce. The obvious benefits of suing for divorce were three-fold:

1) The divorce litigation would be heard in Supreme Court, removing the case from Family Court which was applying pressure to compel support;

2) Since New York State has no unified court system, Mr. Getz could turn the tables and make himself the plaintiff and Mrs. Getz the defendant by the simple expedient of filing a new suit;

3) Once he had succeeded in putting all of his earnings and assets beyond the reach of the court, Mr. Getz could force the sale of the family home as if it were the couple's only asset.

Furthermore, Mr. Getz's attorney could argue in Supreme Court a proposition that might have seemed ludicrous in Family Court: that his client could *not* afford to support his wife while he was paying many hundreds of thousands of dollars in attorneys' fees, far in excess of what was owed to her.

The case has dragged on for years. For an extended period of time, it was marked off the calendar at the request of Mr. Getz's attorney so his client could undergo treatment for his alcoholism. Eventually, it was set down for trial.

Demonstrative of the lack of specialized judicial supervision of divorce proceedings in New York State is the fact that the male trial judge in this case was ordinarily assigned to try criminal cases. At the time he was assigned to the *Getz* case, he was totally inexperienced in domestic relations matters.

Petitioner contends that there were several basic legal errors in the conduct of the trial:

- the court's jury charge on cruelty.

- the court's denial of the wife's recrimination defense to the charge of her adultery (and cruelty).

- the court's instruction allowing the jury to consider evidence of the wife's alleged adultery on the cruelty charge, while reserving the husband's adultery for later trial.

None of these major legal errors have *ever* been reviewed on appeal. On six separate occasions, the Appellate Division summarily rejected the wife's appeals without full briefing of the issues or oral argument in any form.

Meanwhile the proceedings have left the wife's life in shambles:

- The trial judge ordered the sale of the family home even before final judgment was entered.

- The trial judge denied the customary stay pending appeal, and would not even allow the wife to post a supersedeas bond.

- The trial judge terminated the support order entered by the Family Court and awarded no maintenance in its place.

- The trial judge denied award of the wife's attorneys' fees.

The wife has been left virtually destitute, faced with huge bills for legal expenses and the humiliation of a divorce judgment based on sharply contested allegations, all to satisfy the whim of an alcoholic husband who decided he had enough of the wife who stood by him for 25 years, and wanted to take up a new lifestyle in California with younger women who had no scruples about living with a married man.

When the husband instituted his suit in New York State Supreme Court, the issue of his abusive behavior under the influence of drugs and alcohol was removed from the low cost expert mediation procedures of Family Court into the arena of full-blown commercial litigation – a forum where legal costs soar and where lawyers can generate exorbitant fees through tactics of delay and obstruction. The New York court system itself then destroyed what the wife had been able to salvage for the benefit of the children and the husband despite himself. Everything she has saved for the family was consumed in the kamikaze litigation process.

Wealthier parties have an overwhelming advantage in such "no holds barred" adversary proceedings. In the marriage relationship, the party with access to resources is almost invariably the husband.

In contrast to the conciliation promoted in Family Court, the object of divorce proceedings in State Supreme Court is to break up the marriage and divide up the property. These proceedings rapidly become costly wars of attrition fueled by the acrimony released in splitting the marriage. The property is eaten up by legal fees before it can be distributed and, as a rule, the wealthier party (the husband) will be the "winner" and the poorer party (the wife) the "loser." The wife is also the party with primary responsibility for child care and the one who remains economically dependant on their husband's income.

The effect of the present New York law authorizing the institution of divorce actions in the State's primary commercial court is to create a gender based, disfavored classification. This classification cannot withstand the "heightened scrutiny" to which it must be subjected under the well established rulings of this Court. *See Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440-41 (1985) *citing Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

The New York State Legislature's 1975 and 1980 reaffirmance of the system which perpetuates archaic, anti-female bias, is clear evidence that "a gender-based discriminatory purpose has, at least in some measure, shaped" the New York divorce law. *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 276 (1979)

The disproportionate impact on women of the New York system was clearly foreseeable by the Legislature, and the hardships it imposes are plain and undeniable. That women have historically been burdened with social, political and economic handicaps is beyond dispute.[2] *See Califano v. Webster*, 430 U.S.

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[2] The Court has stated that "[o]f course, the historical background of the [Legislative] decision is one evidentiary source of proof of intentional discrimination." *McCleskey v. Kemp*, 481 U.S. 279, 298 n. 20 (1987) [Citation omitted.] This Court can take judicial notice that the membership of the New York State Legislature in 1966 (the year Section 170 was enacted) was overwhelmingly male.

313, 317-318 (1977) (recognizing "the long history of discrimination against women," especially "economic discrimination.") It was therefore inevitable that an expensive system of divorce litigation would be particularly onerous for wives. This Court has declared in such instances, that "[c]ertainly, when the adverse consequences of a [neutral] law upon an identifiable group" are sufficiently "inevitable," "a strong inference that the adverse effects were desired can be reasonably drawn." *Ibid.*, 442 U.S. at 279 n. 25.

It is particularly reasonable and necessary to draw this inference on the critical question of the Legislature's discriminatory intent:

> since reliable evidence of subjective intentions is seldom obtainable, [and] resort to inference based on objective factors is generally unavoidable. *See Beer v. United States*, 425 U.S. 130, 148-149, n. 4, 47 L. Ed.2d 629, 96 S.Ct. 1357 (1976) (Marshall J., dissenting); *cf. Palmer v. Thompson*, 403 U.S. 217, 224-225, 29 L. Ed.2d 438, 91 S.Ct. 1940 (1971); *United States v. O'Brien*, 391 U.S. 367, 383-384, 20 L. Ed.2d 672, 88 S.Ct. 1673 (1968)

Id. at 283 (Brennan, J. dissenting)

The inference of discriminatory purpose from the system's adverse impact on women is bolstered by the New York Legislature's re-endorsement of this result throughout the decades in which the Legislature has revamped D.R.L. § 170, *et seq.*, but still allowed the New York Supreme Court, the State's principal commercial court, to retain jurisdiction over divorce actions. This demonstration of tacit legislative approval of a system which is patently lopsided against women (*see Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 381-82 (1969)) indicates the presence of invidious anti-female discrimination in the Legislature's retention of the system.[3] In light of this "proof that

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[3] The Legislature's maintenance of the current system in the face of the evidence of its disparate impact upon women contained in the recent official New York

(Footnote continued)

a discriminatory purpose has been a motivating factor in the decision" to retain the grossly inequitable New York system of divorce litigation, "judicial deference [to the Legislature] is no longer required." *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977). The less costly alternatives reasonably available to New York's current system are not only evidence of discrimination, (*Cf. Monroe v. Board of Commissioners*, 391 U.S. 450, 459-60 (1968)), they are an example of what might be implemented as a fair and feasible substitute.

POINT II

THE STATUTORY PROVISION FOR SEPARATE CONSIDERATION OF THE HUSBAND'S AND WIFE'S ADULTERY IS A DENIAL OF DUE PROCESS AND EQUAL PROTECTION

This divorce action is founded on two causes of action: adultery and cruelty. The evidence of the wife's alleged adultery consisted of testimony that the wife was seen in her bedroom/office together with a visiting (terminally ill) Swedish doctor, Dr. Sune Byren, who was a family friend. The event allegedly took place in 1985, four years after her husband had abandoned her and at a time when he was admittedly living openly with another woman in California. The defendant-wife testified that no adultery had ever taken place. The doctor also denied it and testified that he could not possibly have committed adultery since he was impotent.

The proof of cruelty consisted of evidence that the wife was secretly administering "Antabuse" to the husband under doctor's advice in an attempt to prevent violence to himself and

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State Court System Task Force Report (*See supra*, pp. 12-14) is evidence of the Legislature's "current intent" to discriminate. *See McCleskey v. Kemp*, 481 U.S. at 298, n. 20, (1987) Thus, the Legislature's "invidious discriminatory purpose may. . . be inferred from the totality of the relevant facts," including the fact that the N.Y. divorce law "bears more heavily" on women than men. *Washington v. Davis*, 426 U.S. 229, 242 (1976)

his family from his alcoholism. The jury was also instructed that it could take into consideration on the cruelty charge, the evidence of the wife's alleged adultery.

The Defense of Recrimination

The wife asserted as an affirmative defense that the plaintiff-husband had lived with one Jane "Roe" [Jane Walsh] continuously for five years. (A - 45)[4] Although Section 171 of New York's Domestic Relations Law makes the plaintiff's adultery an absolute bar to a divorce on adultery grounds, the trial judge severed the trial as to the husband's adultery, and submitted the issues of the wife's adultery and cruelty to the trial jury, which found in favor of the husband on both grounds on May 29, 1987. (A - 4-21) At the time the issues were submitted to the jury, the trial judge charged the jurors that they could consider the evidence of the wife's alleged adultery on *both* the adultery and cruelty issues. (R - 2133-2135)[5] A post-trial statement by one of the jurors indicated that they did exactly that.[6]

The trial judge dismissed the affirmative defense of recrimination, asserting that the evidence was "entirely circumstantial." That finding was plainly refuted by the record. The husband unabashedly admitted that he had lived with his girlfriend Jane Walsh for five years – from 1982 until 1987 – and he repeated that admission under oath on *three separate occasions* during his testimony, including acknowledging the existence of a "palimony" agreement under which he had paid Ms. Walsh $10,000.[7] Since this was an uncontroverted *admission by a party*,

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[4] "A" refers to pages of the Appendix filed in the Appellate Division.

[5] "R" refers to Record on Appeal from Judgment of Divorce of October 6, 1987.

[6] The juror stated: "Look, if she could commit adultery she could be cruel and inhuman too." Record on Appeal from denial of motion for a new trial, at pp. 198.

[7] A- 78-79, A - 81, and A - 83-84.

the trial judge had no conceivable basis to discredit the testimony offered in support of the recrimination defense.

The husband's admissions were corroborated by his grown son, Nicolaus Getz, and by his former talent agent, Abby Hoffer.[8]

Plaintiff's sworn trial testimony that he lived with Jane Walsh for five years constituted an uncontroverted *judicial admission* which was binding and conclusive against plaintiff. *See Skelda v. MTA*, 76 A.D. 2d 492, 430 N.Y.S.2d 840, 842 (2d Dept. 1980). Yet the trial judge not only rejected the proof, he also kept it from the jury.

Impact on the Jury's Verdict

The very last instruction the trial judge gave the jury – at the critical moment the jury was brought back into the courtroom expectantly after the court's final charging conference with counsel – was for the jurors to consider the wife's adultery on the *cruelty* claim:

> THE COURT: Ladies and gentlemen, I further charge you that adultery is an element of the cause of action of cruelty. (Tr. of May 29, 1987, at p. 33).

This charge was given at the express request of plaintiff's counsel:

> MR. COHEN: Your Honor, I would ask your Honor to charge that adultery is an element with respect to the cause of action for divorce on the ground of cruelty.
>
> THE COURT: Yes, I will so instruct them.
>
> (Tr. of May 29, 1987, at p. 31).

Uncontroverted proof of the husband's adultery would have barred a finding of adultery by the wife if it had been submitted

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[8] A - 56-64 and A - 89-90.

to the jury. The jury's verdict against the wife on cruelty in the absence of such proof was therefore tainted by their consideration — at the court's instruction — of the evidence of the wife's adultery. Since the jury verdict on cruelty was a general one, the verdict should have been nullified.

Concealing the husband's adultery from the jury turned the character of the parties upside down. The wife was portrayed as the philanderer and the husband as a choir boy. The judgment on the cause of action for divorce based on cruelty was therefore invalid. Depriving Mrs. Getz of the right to a jury trial on her recrimination defense unfairly tipped the scales in his favor and violated constitutional due process and equal protection. *Lindsey v. Normet*, 405 U.S. 56 (1972) (rights afforded one litigant cannot arbitrarily be denied other litigants)

Denial of Equal Protection

Section 171 of the New York Domestic Relations Law provides that proof of the plaintiff's own adultery denies the plaintiff the right to a divorce even though the adultery of the defendant is established. New York courts have ruled that this defense is to be heard and decided only by the judge without a jury. *See Eliot v. Eliot*, 70 A.D. 2d 612, 416 N.Y.S.2d 328 (2nd Dept. 1979) The statute therefore unfairly and arbitrarily discriminates in favor of plaintiffs and against defendants by permitting juries to consider evidence of the defendant's alleged adultery in a vacuum, with the plain inference that the plaintiff is wholly innocent of wrongdoing. Moreover, since wives rarely have the resources to bring or pursue plenary divorce actions to judgment, this statute denies equal protection on gender grounds as well.

POINT III

PETITIONER WAS WRONGFULLY DENIED HER CONSTITUTIONAL RIGHT TO AN APPEAL

Mrs. Getz's appeal from the final judgment in the divorce action was filed and perfected in a timely fashion and she scrupulously observed all the applicable appellate procedures. The appeal however, was summarily dismissed *on the merits* by the appellate court on motion, without a hearing on the significant issue of law it presented. A single set of motion papers was a patently inadequate basis for consideration of the complex factual and legal questions presented on the appeal. Mrs. Getz was never given the opportunity to present her arguments in writing and orally to each member of the court. No respondent's brief or reply brief was ever served or filed. *See* CPLR Section 5528-5530. No oral argument was heard, and petitioner was denied the opportunity to clarify any of the appellate court's questions on the governing issues on appeal. These procedures are not an empty formalism but are designed to produce a just decision by a fully informed court. A summary dismissal on *substantive*, as opposed to *procedural*, grounds is believed to be unheard of in New York State. There is no statutory authorization for such a circumvention of the normal appellate process. The use of the procedure here was arbitrary and capricious and the result was devastating.

Petitioner Was Denied Equal Protection

This Court has held that refusal to afford each appellant an appeal on the same terms as other litigants violates the equal protection clause of the United States Constitution:

> This Court has held that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review. When an appeal is afforded, however, ***it cannot be granted to some litigants and capriciously or arbitrarily denied to others*** without violating the Equal Protection Clause.

> *Lindsey v. Normet*, 405 U.S. 56, 77 (1972). (Emphasis added.) [Citations omitted.]

In New York State, appellate review has long been enshrined in judicial decisions as an "essential right." *Matter of Luckenbach*, 303 N.Y. 491, 496 (1952), *quoting Yates v. People*, 6 Johns. (N.Y.) 337, 364 (1810) ("Our law considers it an essential right of a suitor to have his cause examined in tribunals superior to those in which considers himself aggrieved.") *See also* Hopkins, *The Role of An Intermediate Appellate Court*, 41 Bklyn. L. Rev. 459, 463 (1975) ("The notion is firmly rooted that a litigant is entitled to at least one review of an adverse final decision.") The Constitution of the State of New York affords litigants an elaborate structure of appellate courts. New York Const. Art. 6, sections 1 - 5, 8. Petitioner-wife, however, has arbitrarily been denied access to the constitution-mandated apparatus of appellate justice.

Discrimination against petitioner violated "[t]he Equal Protection Clause of the Fourteenth Amendment . . . which is essentially a direction that all persons similarly situated be treated alike." *Cleburne v. Cleburne Living Center* 473 U.S. 432, 439 (1985); (Citations omitted.)

There is no rational basis for denying Mrs. Getz the rightful measure of appellate justice which similarly-situated litigants receive as a matter of course. Her appeal of the trial court's equitable distribution decision was authorized by CPLR 5701. She complied with all procedural requirements under statutes and court rules. Nevertheless, she inexplicably received only a summary consideration and dismissal on the merits without briefing and argument to the full bench. The Appellate Division's action constituted a denial of equal protection under New York State laws guaranteeing the right to appeal to the Appellate Division. The New York Court of Appeal's refusal to review that arbitrary dismissal compounded that violation. This Court is petitioner's last chance to correct the injustice of this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
September 28, 1990

Respectfully submitted,

WHITNEY NORTH SEYMOUR, JR.
Attorney for Petitioner
100 Park Avenue, Room 2606
New York, New York 10017
(212) 599-0068

ALAN D. SCHEINKMAN

CRAIG A. LANDY
PETER JAMES CLINES
BROWN & SEYMOUR
Of Counsel

APPENDIX

APPENDIX A

COURT OF APPEALS OF THE
STATE OF NEW YORK

STANLEY GETZ,

Respondent,

1-11 *v.* Mo. No. 543

MONICA GETZ,

Appellant.

ORDER

Motion for leave to appeal denied.

DECISION COURT OF APPEALS

July 2, 1990

APPENDIX B

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

MILTON MOLLEN, P.J.
WILLIAM C. THOMPSON
RICHARD A BROWN
ALBERT M. ROSENBLATT, JJ.

Motion No. 9690

Stanley Getz, respondent, v
Monica Getz, appellant

DECISION & ORDER
ON MOTION

Motion by respondent to dismiss the defendant's appeal from so much of a judgment of the Supreme Court, Westchester County, entered March 10, 1989, as limited by the appellant's brief to that portion of the judgment as dismissed the defendant's defense of recrimination, which cannot be used as defense to a cause of action based on cruelty.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is granted and the appeal is dismissed, without costs.

MOLLEN, P.J., THOMPSON, BROWN and ROSENBLATT, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

December 7, 1989

APPENDIX C

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

MILTON MOLLEN, P.J.
WILLIAM C. THOMPSON
RICHARD A BROWN
ALBERT M. ROSENBLATT, JJ.

Motion No. 672

Stanley Getz, respondent,
v Monica Getz, appellant

DECISION & ORDER
ON MOTION

Motion by appellant for reargument of the respondent's motion to dismiss the defendant's appeal from a judgment of the Supreme Court, Westchester County, entered March 10, 1989, which was granted by order of this court dated December 7, 1989, or in the alternative, (2) for leave to appeal to the Court of Appeals from this court's order dated December 7, 1989 and (3) for oral argument on this motion.

Upon the papers filed in support of the motion and the papers filed in opposition thereto:

ORDERED that the motion is denied with $20 costs.

MOLLEN, P.J., THOMPSON, BROWN and ROSENBLATT, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

February 5, 1990

No. 90-562

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MONICA GETZ,

Petitioner,

vs.

STANLEY GETZ,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF RESPONDENT, STANLEY GETZ, IN OPPOSITION

LOUIS A. MANGONE*
32 East 57th Street
New York, New York 10022
(212) 759-1401

COHEN AND SHALLECK
888 Seventh Avenue
New York, New York 10106

Attorneys for Respondent

* *Counsel of Record*

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No. 90-562

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MONICA GETZ,

Petitioner,

vs.

STANLEY GETZ,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF RESPONDENT, STANLEY GETZ, IN OPPOSITION

Respondent, Stanley Getz, respectfully asks that the petition for a writ of certiorari sought by Monica Getz to review the order of the Court of Appeals of the State of New York entered on July 2, 1990, be denied. Said order denied her motion for leave to appeal the order of the Appellate Division entered December 7, 1989 dismissing her appeal, as limited by her brief, to that portion of the judgment which dismissed her defense of recrimination which cannot be used as a defense to a cause of action for divorce based on cruelty. Monica Getz's motion to reargue the motion to dismiss her appeal, or, in the alternative, for leave to appeal to the Court of Appeals of the State of New York, was likewise denied by the Appellate Division.[1]

[1] See Appendix A, Appendix B and Appendix C to the Petition herein.

COUNTERSTATEMENT OF THE CASE AND FACTS

Petitioner's blatant misstatements of the case and the facts make this counterstatement necessary pursuant to Rule 15 of the Rules of this Court.

It should be noted at the outset that there is *presently pending* in the Appellate Division of the Supreme Court of the State of New York, Second Department, Monica Getz's appeal from that portion of the order of Hon. Nicholas Colabella, filed and entered in the office of the County Clerk of Westchester County on January 12, 1990, which denied her cross-motion to set aside the jury verdict and the judgment of divorce and for a new trial on the issue of fault, and to vacate or modify the equitable distribution judgment entered on March 10, 1989. That appeal has been perfected and all briefs have been filed; it merely awaits the scheduling of a date for argument before the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department. Petitioner herein makes no mention of this pending appeal. It is indeed obvious, therefore, that this petition for a writ of certiorari to the Court of Appeals of the State of New York should be summarily denied since the July 2, 1990 order of that Court does not constitute a final determination of this case.

The order of the New York Court of Appeals denying petitioner's motion for leave to appeal the dismissal by the Appellate Division of her appeal from the judgment entered in Westchester County on March 10, 1989 was proper. There was no denial of her rights and no violation of the due process and equal guarantees of the Fourteenth Amendment; and, certainly, her petition raises no real issue as to the "gender bias" of any New York statute.

The action for divorce, commenced in 1981, was brought upon two grounds, adultery and cruel and inhuman treatment. These fault issues were tried before a jury which separately and unanimously found in favor of the plaintiff, Stanley Getz (Respondent herein) on both adultery and cruelty grounds after a thirteen (13) day trial. It is significant to note that, despite

the fact that the jury found against defendant, Monica Getz, (petitioner herein) on both adultery and cruelty grounds, the Judgment of Divorce was made and entered *only* upon the ground of cruelty (App. 1).

The judgment of divorce was dated October 6, 1987 and entered on October 7, 1987, more than three years ago. Monica Getz filed a notice of appeal from that judgment but did not timely perfect the appeal. She was granted a substantial extension of time by the Appellate Division to perfect her appeal with the admonition that "no further extension of time would be granted". (App.2) Despite such admonition she still did not perfect her appeal within the *extended* time and moved for an enlargement of time to settle the record on appeal from the judgment of divorce. This motion was *denied* by decision and order of the Appellate Division dated May 11, 1989, and on the Court's own motion the appeal from the judgment of divorce was dismissed. The Appellate Division noted as follows:

> "The appellant sought and received an extension of time to perfect this appeal. The appellant was on notice that 'no further extension of time would be granted' " (App. 3)

Monica Getz then moved for reargument of her motion to enlarge her time to perfect her appeal from the judgment of divorce. Reargument was denied by decision and order of the Appellate Division dated September 5, 1989 (App. 4)

The petitioner (defendant below) moved in the trial court to set aside the jury verdict which had found that she had committed acts constituting cruel and inhuman treatment *and* adultery. That motion was denied by order of Justice Colabella entered on January 17, 1989. Petitioner filed notice of appeal from that order to the Appellate Division. Respondent, Stanley Getz, moved, in the Appellate Division to dismiss that appeal from the order denying Monica Getz's motion to set aside the jury verdict. By decision and order of the Appellate Division, dated October 5, 1989, the motion to dismiss the appeal was granted and the appeal was dismissed (App. 5)

It should here be noted that the appeal which the New York Court of Appeals refused to review was from the order of the Appellate Division entered on December 7, 1989 which dismissed petitioner's appeal, as limited by her brief, from that portion of the judgment of Justice Colabella, entered on March 10, 1989, which dismissed petitioner's defense of recrimination.

Since the judgment of divorce in this case was entered only upon the ground of cruelty, and since recrimination is a defense only to a judgment upon the ground of adultery, petitioner's appeal below (limited by her brief to that portion of the judgment which dismissed her defense of recrimination) was properly dismissed by decision and order of the Appellate Division dated December 7, 1989 upon the ground that "recrimination . . . cannot be used as a defense to a cause of action based on cruelty" (See Petitioner's Appendix B).

Since the Appellate Division below dismissed Monica Getz's appeal from the Judgment of Divorce by its decision and order of May 11, 1989 (App. 3); and since that Court denied Monica Getz's motion for reargument by its decision and order of September 5, 1989, (App. 4); and since, by its decision and order of October 5, 1989, (App. 5), that Court dismissed Monica Getz's appeal from the order of Justice Colabella which denied her motion to set aside the jury verdict and for a new trial; it would have been bootless and inappropriate to permit Monica Getz's limited appeal from the judgment of Justice Colabella, entered on March 10, 1989, which dismissed her defense of recrimination.

The petitioner's recital of "The Facts" is woefully distorted and untruthful in an obvious attempt to create the utterly false impression that she is "near destitution"; that her life "has been left in shambles"; and that she has been denied rights "in violation of the due process and equal protection guarantees of the Fourteenth Amendment"; and that New York's divorce statute is gender biased.

The equitable distribution decision of Justice Colabella and the judgment entered thereon, on March 10, 1989 (App. 6)

awarded to Monica Getz an equal (50%) distribution of marital property.[2] Included in that award to Monica Getz is 1/2 the net proceeds of the sale of the Shadowbrook estate (the former marital home) where petitioner still resides alone. Shadowbrook consists of a 28 room main house (with a living area of 11,155 feet) and 2 guest houses situated on more than 9 acres in Irvington, New York. In September 1988, Justice Colabella directed the sale of Shadowbrook. Monica Getz's motion to stay the sale was denied by the Appellate Division. Solely because of Monica Getz's refusal to cooperate in such sale, Justice Colabella appointed an appraiser to evaluate the property. It was valued by the court appointed appraiser at $2,250,000. A potential buyer was found at an all cash (subject to mortgage) selling price of $2,400,000, $150,000 more than the court appraiser's evaluation. Stanley Getz and the purchaser signed the contract of sale. Monica Getz refused to sign the contract. Stanley Getz, because of Monica's unjustifiable refusal to sign the contract, made application to the Court to direct the Sheriff of Westchester County to sign the contract and deed on behalf of Monica. That application was granted and the contract was signed by the Sheriff on Monica's behalf.

Unfortunately, the sale of Shadowbrook fell through because of the purchaser's inability to secure the required mortgage. As a result, Monica Getz still resides at Shadowbrook and, contrary to her false claim of poverty, she is receiving more than $75,000 per year in rentals from that property pursuant to the judgment of Justice Colabella, entered on March 10, 1989, which, in pertinent part, awards to her the rents from Shadowbrook "pending the sale of the Shadowbrook property".

Furthermore, that judgment of March 10, 1989, provides for an equal division between the parties of all royalties for recordings made by Stanley Getz from the date of the marriage in November 1956 to the commencement of the divorce action in

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[2] It is significant to note that from the very commencement of this action, Stanley Getz consented to a 50% division of all marital assets. Monica Getz, however, demanded even a greater distribution.

February 1981. As a result, Monica Getz has received from Polygram Records her 50% share of Stanley Getz's royalties totalling, in 1987 and 1988, more than $112,000 or an average yearly income to Monica Getz of $56,000. It is estimated that she received the same or similar income from royalties in 1989 and, to date, in 1990. Bearing in mind that her royalty income is not taxable, as part of an award of equitable distribution, it is indeed obvious that her claim of being "near-destitution" should fall on deaf ears. Her yearly income from Shadowbrook rents and record royalties totals at least $133,000.

In addition the equitable distribution judgment of March 10, 1989, directs the sale of 5000 square meters of jointly owned real property in Spain. That property was purchased in 1970 for $30,000. The judgment directs an *equal* division of the net proceeds of said sale. As yet, that property has not been sold.

Nowhere in her recital of facts does the petitioner mention the fact that Stanley Getz is terminally ill from liver cancer, lymphoma and cirrhosis of the liver. This finding was made by Justice Colabella in his decision of February 10, 1989 culminating in the judgment of March 10, 1989, based upon the medical records and testimony adduced and the Mayo Clinic reports. The petitioner, upon application to the Court, was given permission to conduct a physical examination of Stanley Getz by a physician of her choice. Such examination was conducted by the physician selected by petitioner, Dr. Peter David Boasberg in Santa Monica, California. Dr. Boasberg confirmed the diagnosis of Dr. Avram Cooperman (who testified at the trial) and of the Mayo Clinic that Stanley Getz is terminally suffering from proven liver cell cancer and lymphoma. Dr. Boasberg stated at the conclusion of his report of March 13, 1990, that respondent's "time is extremely limited and could be measured in a matter of a few months".

Furthermore, nowhere in petitioner's recital of facts does she allude to the finding, after trial, by Justice Colabella that, in contrast, she is in apparent good health and that, unlike respondent's situation, there is no impairment to her ability to work

and to supplement the equitable distribution award. Petitioner is college educated, multilingual and, as found by Justice Colabella, experienced in the production end of the entertainment industry and that her many diverse talents are shown by her "volunteer work in founding the Swedish Council on Alcoholism and Addiction, her current initiative to develop a substance abuse program in the Soviet Union, her appointment as Chairman of the Board for the National Council on Alcoholism and her service on the Board of Directors of Odyssey House." She was further found to be "an extremely determined and resourceful individual." With respect to petitioner's earning ability, Justice Colabella succinctly stated:

> "If defendant has suffered a diminishment in earning ability, due to a lack of recent remunerative employment, it is the product of her own choosing. She has had ample opportunity since 1981 to either reenter the work force or obtain additional education to prepare for her return to work".

To dispel the false impression created by petitioner that this litigation, commenced in 1981 was, in any way delayed because of any actions or tactics by Stanley Getz, we are impelled to relate the procedural history of this case up to the ultimate determination by Justice Colabella. There can be no question that it was the petitioner, Monica Getz, who made every conceivable effort to delay this case in order to avoid entry of divorce and final resolution of all financial issues.

This action for divorce in the Supreme Court of the State of New York was commenced in February, 1981. Stanley Getz's complaint was dated August 10, 1982. An answer was interposed on August 18, 1982. Separate support proceedings were conducted in the Family Court in 1982. The parties entered into an "Agreement Toward Reconciliation" on February 11, 1982. Extensive depositions and pre-trial discovery took place in both the Family Court and the Supreme Court actions.[3] After

[3] Only the Supreme Court of the State of New York has jurisdiction over divorce actions.

extensive additional Family Court proceedings in 1986, the Family Court proceeding was consolidated into the Supreme Court action by Justice S. Barrett Hickman. The case had been placed on the calendar in January 1985 then stricken and thereafter placed on the calendar for trial in 1986.

The sole and only factor which turned this case into the lengthy, expensive and bitterly contested proceeding it has become was Monica Getz's single minded determination to keep control over the only significant marital asset, a home known as Shadowbrook, and to deny Stanley Getz a divorce. The resulting cost in time, energy and money has been astronomical. It is for that reason that approximately seven Judges in two Courts (exclusive of the Appellate Division and the Court of Appeals) have thus far been involved in this case, not to mention seven lawyers on Monica Getz's side alone.

On June 4, 1986, twelve days before the scheduled trial (then before Hon. Vincent Gurahian) after considerable wrangling, hundreds of pages of depositions, numerous pre-trial conferences and proceedings, Monica Getz discharged her long-time attorney, James Dempsey. As a result, she obtained a ten week adjournment from the Court in order to find new counsel. She retained one Abraham Reingold.

Prior to June 1986, Stanley Getz's counsel had made numerous efforts to settle the case, each of which were completely rebuffed by Monica. On one occasion in the Spring of 1986, Stanley Getz flew in from California for the sole purpose of attending a settlement conference at Supreme Court, Westchester County, but Monica refused to even discuss any settlement at that time.

Monica Getz's tactics reached their first crescendo in September, 1986, when Justice Gurahian declared a mistrial after eight days of jury trial.

Justice Gurahian commented:

> *The Court*: Mr. Reingold, you have been trying and trying, for some reason, to get a mistrial. You have

> tried to avoid the beginning of this trial. You have attempted in every way possible to avoid starting this trial. . ."

and, when he declared a mistrial, Justice Gurahian went on to state:

> *The Court*: Mr. Reingold, you have succeeded, and I wish you joy in your success. I think you made a great mistake, I really do, but that's your privilege. I'm happy to be rid of this case *because for six months there have been attempts and maneuvers to avoid a trial of this case.* (emphasis added)

Monica's new counsel, Abraham Reingold, undoubtedly at her behest, embarked on a course of conduct which included innumerable attempts to delay, postpone, and avoid the next trial including multiple motions and a stay application to the Appellate Division, all of which succeeded in wasting a great deal of time and effort and cost a great deal in counsel fees.

Both before and after the declaration of a mistrial before Justice Gurahian, Monica's then attorney made at least four separate motions to stay the trial claiming that Mr. Getz was in arrears in paying support and therefore should not be permitted to proceed with his case. Monica's August 18, 1986 request for this relief was denied by Justice Gurahian on September 4, 1986. A second motion by Monica was denied by Justice Gurahian on September 9, 1986. After the mistrial was declared and Justice Gurahian recused himself, Justice Barrett Hickman was assigned to the case by then Administrative Justice Joseph Gagliardi, whereupon another deluge of delaying applications followed. A third motion to stay the trial by Monica was denied by Justice Hickman's Decision and Order dated October 2, 1986. A fourth motion by her was denied by Justice Hickman's Decision and Order dated February 3, 1987. At that point, Monica had made seven (7) procedural motions.

In a decision dated October 2, 1986 Justice Hickman noted:

"Plaintiff's action for divorce, commenced in August 1981, is now almost six years old. It has been beset by numerous delays which, on the state of this record, should not be allowed to continue."

On November 13, 1988 Justice Hickman wrote:

"The Court will tolerate no further unnecessary delay."

On December 1, 1986 Justice Hickman wrote:

"It bears repeating that this case requires a firm and expeditious disposition which I fully expect to facilitate."

On February 3, 1987, Justice Hickman noted:

"After six years it is time to dispose of this case without further nonsense. It is my intention to file the original of this letter as Court's Exhibit No. "1" at the commencement of the trial, as a record of my directions and instructions to both parties and as a clear indication of the court's feelings on this matter."[4]

In his February 3, 1988 order, Justice Hickman stated:

"The defendant is advised that any further efforts to circumvent the Court's ruling will be dealt with summarily.

The attorneys should be advised that many of the issues which have been raised in these and previous motions have been redundant and unwarranted."

Although these motions, having been denied, were legally unsuccessful, they did manage to cause delay

---

[4] It is to be noted that every application to delay the trial was made by Monica Getz.

to the extent that time, effort and money were spent wading through Monica's frivolous and redundant claims. Moreover, until the motions were decided, it was impossible to proceed with the trial. Indeed, her lawyer kept the Court so busy with redundant applications that the trial could not go forward.

The application to stay the trial was also pursued in the Appellate Division, Second Department, despite the application having been denied on at least four previous occasions by two separate Justices of the Supreme Court. Again, time, effort and money were wasted on a frivolous and voluminous stay application on a matter which already had been argued at length and decided repeatedly against Monica. In the Appellate Division, however, she also sought to recuse the trial judge (S. Barrett Hickman) based on allegations of bias. The bootstrapping reasoning to which she subscribed was that, *inter alia*, since the Court refused to grant the stay, and since the Court was becoming increasingly incensed with the unnecessary, redundant, costly and time consuming motions which were being filed, that therefor the Court was prejudiced against her. Her application was rejected by the Appellate Division.

Following approximately seven months of legal maneuvering by Monica Getz before Justice Hickman, as a result of factors out of his control (including the death of his wife), Justice Hickman was unable to proceed with the case. Justice Gagliardi (then the Administrative Justice of the Supreme Court, Westchester County) thereupon appointed Hon. Nicholas Colabella to act as the presiding Justice for all purposes to oversee the completion of what Justice Gagliardi termed "the worse case he had ever seen".

On July 8, 1988, shortly after the return of the jury verdict (which found Monica guilty of adultery and cruelty) she replaced Mr. Reingold with Sanford Dranoff, Esq. She again attempted to delay the action by attempting to recuse Justice Colabella from presiding over the remaining financial issues of the case upon the ground that Monica's former counsel, Abraham Reingold, campaigned for the same judicial seat, as did Justice

Colabella. The recusal motion was denied but again, ate up a good part of a day that had been set aside for trial.

The unavailability of Mr. Dranoff also resulted in this case being delayed. Despite being brought into the case in July 1988, on numerous occasions, his schedule prevented him from agreeing to dates for the resumption of trial.

Mr. Getz underwent surgery for the removal of a cancerous tumor in September 1987. After considerable discussion and argument, both oral and written, on October 6, 1987 Justice Colabella signed the judgment of divorce in favor of Mr. Getz.

The equitable distribution portion of the trial proceeded in October and December 1987 and was thereafter adjourned. Numerous additional efforts were made to delay the proceedings.[5]

On May 6, 1988 Justice Colabella scheduled the recommencement of the trial to take place on June 6, 1988. The Court's order stated that "no requests for adjournment will be considered". Notwithstanding that order, on June 2, 1988, just days before trial, a new application to delay the trial was presented on the basis of a claimed heart condition of Monica for which no evidence was ever presented. The application was denied. That attempt having failed, she sought a delay on the newest excuse that she was depressed and suicidal. That excuse had never been uttered until then and, in light of the moving papers presented, the Court took testimony on the issue on June 8, 1988 (testimony from Marvin Zolt, Stanley Getz's accountant, was taken on June 6 and 7, 1988). At that time Dr. Judianne Densen-Gerber, Monica's close friend and the physician who admitted her to a hospital for treatment on the very day the trial was to resume, testified. At the hearing, Dr. Densen Gerber admitted that Monica Getz was very strong minded and willful and wished to manipulate the Court. Indeed, marked into evidence were Monica's hand written instructions as to what she wished Dr.

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[5] Only one of the many adjournments was necessitated by Stanley Getz due to the brief unavailability of his accountant.

Densen-Gerber to testify to. The Court in its decision and order dated June 17, 1988 directed a mental examination of Monica which cost Stanley Getz approximately $3,400 for a psychiatrist and psychodiagnostician) exclusive of the cost of legal fees, and put off the resumption of trial until July 18, 1988.

The court-ordered examination of Monica produced no evidence of psychological impairment. Dr. Bloomingdale's report found:

> Cognitively there is absolutely no reason why she could not appear in court and confer with and cooperate with her lawyer. Her memory, concentration, train of thought, thought control, reality testing, judgment and capacity to abstract are excellent. Her emotional adjustment, shows a probable chronic state of frustration, disenchantment, some stress but there are no indications that she will be overwhelmed by this or that she cannot cope with it. One cannot blackmail others into delaying action by threats of what one will do. This is a childish, hysterical position of role-playing and is very manipulative and controlling.

After her examination, Monica, having successfully delayed resumption of this eight-year-old case for another seven weeks, and apparently no longer suicidal nor in need of heart catherization, flew off to Sweden for a visit with her mother and, as it turned out, with Sune Byren, with whom the jury found she committed adultery.

With the financial trial scheduled to resume on July 18, 1988 and being unable to produce any objective medical evidence of her alleged condition, Monica resorted to a previously successful delay tactic by again discharging her attorney on the eve of trial and seeking another adjournment. New counsel, Herman Tarnow, defendant's sixth lawyer (including a Mr. Minton from Chicago, but excluding the numerous lawyers she consulted), first appeared on July 18 at which time the case was

rescheduled for July 25, 1988. After lengthy argument, the matter was set down for the continuation of trial on July 25, 1988 and to continue for the week of August 8, 1988.

On August 8, 1988 the trial proceeded with Mrs. Getz in apparently robust health, both emotionally and physically (on one occasion she literally "ran" out of the courtroom). Moreover, she demonstrated tremendous physical resources during every trial day by working continuously with her new counsel to present her case both prior to the trial and during the trial. All traces of the cardiac and suicidal conditions she once sought to impress upon the Court seemed to vanish.

All of these instances of obstructionism and delay on the part of Monica Getz have had an exceedingly severe and prejudicial effect on Stanley Getz. There has been a tremendous waste of time and money caused by her machinations. Stanley Getz has incurred huge legal fees. He has also been compelled to pay doctor's fees; to pay for court transcripts, etc. etc., not to mention travel expenses and hotel bills virtually all of which could have been avoided.

Considering all the above, can it be said with any degree of logic, that Monica Getz was deprived of due process of law or that she was denied equal protection of the laws? We think not!!!

With complete justification Justice Colabella stated in his decision of February 10, 1989, as follows:

> " . . . defendant has engaged in dilatory tactics in the course of this litigation that have obstructed and unnecessarily delayed the resolution of this action."

REASONS WHY THE WRIT SHOULD BE DENIED

I. The adoption in 1980 of New York's Equitable Distribution Law[6] removed any distinction based solely upon gender.

The immediate impetus for enactment of the Equitable Distribution Law in New York (Section 236 of the Domestic Relations Law) was the 1979 decision by this Court in *Orr v. Orr*, 440 U.S. 268, 59 L.Ed 2d 306, 99 S. Ct 1102 which required that alimony or maintenance statutes be gender neutral. New York's Equitable Distribution Law accordingly removed the sexual discrimination that was express or implied in New York's statutes relating to alimony and support.

The Equitable Distribution Law requires that property be distributed "equitably" after considering certain, statutory factors and upon the circumstances of the case and of the parties. It is mandatory that in any decision made concerning disposition of property, the court "shall" set forth the factors it considered and the reasons for its decision. Justice Colabella, in this case, clearly set forth the required factors considered by him and, in his judgment of March 10, 1989, awarded Monica Getz an equal fifty percent 50% of all marital property. (App. 6)

As was stated in Foster, Freed and Brandes, Law and the Family, Second Edition, Equitable Distribution at p. 331:

> "We also believe that on the whole, the New York courts have done a commendable job of construing the Equitable Distribution Law, although we disagree with a few decisions. Our reading of the post 1980 decisions shows that the New York courts, with few exceptions, have fathered the spirit as well as the letter of the Equitable Distribution Law and that the law is working as intended".

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[6] Chapter 281 of the Laws of 1980, eff. July 19, 1980.

It is clear that petitioner's attack upon the constitutionality, of New York's Equitable Distribution Law (Section 236 of the Domestic Relations Law) should fall on deaf ears.

II. Petitioner was not denied Equal Protection or Due Process of Law under the Fourteenth Amendment.

We quarrel not with petitioner's argument that a refusal to afford each appellant an appeal on the same terms as other litigants violates the equal protection clause of the United States Constitution.

In this case, however as we pointed out in our Counterstatement of Facts, the petitioner's appeal from the judgment of divorce entered only on the ground of *cruelty* (based upon the jury verdict which found her guilty of both adultery and cruelty) was dismissed in the Appellate Division because she failed to timely perfect her appeal even *after* having received a substantial extension of time to do so (App. 2). Her motion for reargument was likewise denied (App 3).

The dismissal of her appeal, therefore, was not a denial of due process or equal protection under the Fourteenth amendment. She was *not* denied her right to appeal. She herself abused that right by not properly perfecting her appeal.

Petitioner's reliance upon *Lindsay v. Normet*, 405 U.S. 56, is unfounded since that case involved the inability of an indigent who could not post the penalty bond required to appeal from an adverse judgment. No claim of "indigency" was ever made by petitioner nor could she possibly have made such a valid claim. (See also: *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct, 585 cited by petitioner), which involved an indigent criminal who was denied an appeal; and *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780).

III. Petitioner's appeal from the March 10, 1989 "equitable distribution" judgment was properly dismissed since it was limited only to the defense of recrimination which cannot be used as a defense to a cause of action based on cruelty (See petitioner's App B).

Section 171 of New York's Domestic Relations Law, provides that a plaintiff is not entitled to a divorce although the adultery is established:

> ". . . 4. Where the plaintiff has also been guilty of adultery under such circumstances that the defendant would have been entitled, if innocent, to a divorce".

This defense of recrimination does not apply to any grounds for divorce other than adultery. It has no application here where the divorce was entered only upon the ground of cruel and inhuman treatment (App. 1).

As was stated in Book I, Foster, Freed and Brandes, Law and the Family. Second Edition, 7:1, in discussing Section 171 of the Domestic Relations Law:

> "The language of the unrepealed and unmodified Section 171 is such that it clearly relates only to a divorce on the ground of adultery and it would do violence to the ordinary meaning of words to hold that it applied to the new grounds for divorce."

All of the statutory defenses created by Section 171 of the Domestic Relation Law apply *only* to adultery divorces (*Woicik v. Woicik*, 66 Misc 2d 357, 321 N.Y.S. 2d 5; *Ash v. Ash*, 53 App. Div. 2d 1039, 386 N.Y.S. 2d 159; *Lowe v. Lowe*, 67 Misc 2d 271, 324 N.Y.S. 2d 229; aff'd 37 App. Div. 2d 525, 322 N.Y.S. 2d 975).

Monica Getz's limited appeal from the March 10, 1989 judgment was not summarily dismissed by the Appellate Division. It must be noted that the Appellate Division had before it her appellant's brief which limited her appeal to the issue of

recrimination. The fact that the Appellate Division dismissed her appeal without the benefit of a respondent's brief does not constitute a denial of her right to an appeal. The dismissal was not a *summary* dismissal. It was based on well established statutory law to the effect that recrimination cannot be used as a defense to a cause of action, as here, based upon cruelty. And that was a primary basis for Stanley Getz's motion to dismiss that appeal.

IV. Petitioner's appeal from the order of Justice Colabella denying her cross-motion to set aside the jury verdict and the judgment of divorce and for a new trial, has been perfected and presently awaits scheduling of a date for argument before the Appellate Division Second Department. Consequently, the order of the New York Court of Appeals, dated July 2, 1990, from which certiorari is sought is not a final order.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: October 31, 1990

Respectfully submitted,

LOUIS A. MANGONE*
32 East 57th Street
New York, New York 10022
(212) 759-1401

COHEN AND SHALLECK
888 Seventh Avenue
New York, New York 10106

Attorneys of Respondent

**Counsel of Record*

APPENDIX

APPENDIX 1

At an IAS Part of the Supreme Court of the State of New York, held in and for the County of Westchester, at the Courthouse, 111 Grove Street, White Plains, New York, on the 6th day of October, 1987

P R E S E N T :

Hon. Nicholas Colabella,

Justice

----------X

STANLEY GETZ, :

Plaintiff, : JUDGMENT OF DIVORCE

—against— :

: Index No. 13940/81

MONICA GETZ, :

Defendant. :

----------X

The above entitled action having been brought by the plaintiff for judgment of divorce dissolving the marriage of the parties by reason of the cruel and inhuman treatment of the plaintiff by the defendant pursuant to Section 170(1) of the Domestic Relations Law; and the summons bearing the notation "Action for Divorce" and the verified complaint having been served within the State of New York; and the defendant having appeared and having served an answer; and the plaintiff having moved to amend his complaint and the court having granted plaintiff's motion to amend his complaint by Order dated October 21, 1986; and the defendant having filed an answer to the plaintiff's amended complaint; and the plaintiff having appeared by his attorneys, COHEN AND SHALLECK, (Jeffrey R. Cohen and Stanley D. Heisler, of counsel); and the defendant having

appeared by her attorneys, Glabman, Rubenstein & Reingold (Abraham Reingold, of counsel); and the cause having come on for trial before a duly empaneled jury on the 11th day of May, 1987; and the case having been tried on May 12, 13, 14, 18, 19, 20, 21, 22, 26, 27, 28 and 29, 1987, testimony having been given in open court; and the jury after due deliberation, having rendered its unanimous verdict on May 29, 1987 that the conduct of defendant, Monica Getz, did so endanger the physical or mental well being of plaintiff, Stanley Getz, as to render it unsafe or improper for plaintiff to cohabit with defendant; and

Now, therefore it is:

ORDERED AND ADJUDGED that the plaintiff, STANLEY GETZ, be and he hereby is granted judgment of divorce dissolving the marriage of the parties by reason of the cruel and inhuman treatment of the plaintiff by the defendant pursuant to Section 170(1) of the Domestic Relations Law; and it is further

ORDERED that, pending further order of the Court, neither party shall dispose of, transfer, pledge, or encumber the parties' interest in the Shadowbrook property; and it is further

ORDERED that the Court retains jurisdiction to determine all pending matters and issues ancillary to the parties' divorce which shall be heard at the direction of the Court; and it is further

ORDERED that pending further Order of the Court, all *pendente lite* Orders currently in effect are continued.

ENTER

/s/ Nicholas Colabella

Justice of the Supreme Court
Nicholas Colabella
Acting J.S.C.

APPENDIX 2

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

MILTON MOLLEN, P.J.
GUY J. MANGANO
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN, JJ.

Motion No. 195

DECISION & ORDER
ON MOTION

Stanley Getz, respondent,
v Monica Getz, appellant.

Motion by appellant to enlarge time to perfect the appeal from a judgment of the Supreme Court, Westchester County, dated October 6, 1987.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is granted; and it is further,

ORDERED that the appellant's time to perfect the appeal is enlarged to the June 1989 term; and the appeal shall be placed on the calendar for said term; and it is further,

ORDERED that the record on appeal and appellant's brief must be served and filed on or before March 31, 1989; and respondent's brief must be served and filed on or before May 1, 1989.

No further extensions of time will be granted on this appeal.

ENTER:

MARTIN H. BROWNSTEIN
Clerk

APPENDIX 3

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

MILTON MOLLEN, P.J.
GUY J. MANGANO
SYBIL HART KOOPER
ARTHUR D. SPATT, JJ.

Motion No. 2667

DECISION & ORDER
ON MOTION

Stanley Getz, respondent,
v Monica Getz, appellant.

Motion by the appellant for an enlargement of time to settle the record on appeal from a judgment of the Supreme Court, Westchester County, dated October 6, 1987, and for other related relief.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied, and on the court's own motion, it is further,

ORDERED that the appeal is dismissed without costs.

The appellant sought and received an extension of time to perfect this appeal. The appellant was on notice that "no further extension of time would be granted".

MOLLEN, P.J., MANGANO, KOOPER and SPATT, JJ., concur.

ENTER:

MARTIN H. BROWNSTEIN
Clerk

May 11, 1989 GETZ v. GETZ

APPENDIX 4

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

MILTON MOLLEN, P.J.
GUY J. MANGANO
SYBIL HART KOOPER
ARTHUR D. SPATT, JJ.

Motion No. 4670

DECISION & ORDER
ON MOTION

Stanley Getz, respondent,
v Monica Getz, appellant.

Motion by appellant for reargument of the motion to enlarge time to perfect the appeal from a judgment of the Supreme Court, Westchester County, dated October 6, 1987, which was denied by order of this court dated May 11, 1989 and upon the court's own motion, dismissed the appeal.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied.

MOLLEN, P.J., MANGANO, KOOPER and SPATT, JJ., concur.

ENTER:

MARTIN H. BROWNSTEIN
Clerk

September 5, 1989 GETZ v. GETZ

APPENDIX 5

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

CHARLES B. LAWRENCE, J.P.
JOSEPH J. KUNZEMAN
ISAAC RUBIN
GERALDINE T. EIBER, JJ.

Motion No. 7624

DECISION & ORDER
ON MOTION

Stanley Getz, respondent,
v Monica Getz, appellant.

Motion by respondent to dismiss the appeal of the defendant from an order of the Supreme Court, Westchester County, entered January 17, 1989, which denied defendant's motion to set aside the jury verdict, which found the defendant had committed acts constituting cruel and inhuman treatment and adultry in this divorce action, on the grounds that (1) this court by order dated May 11, 1989, dismissed defenfant's appeal from the judgment of divorce of the same court, dated October 6, 1987, (2) by order dated September 5, 1989, this court denied reargument of the motion to dismiss, and (3) the record on appeal as filed on the appeal from the order does not contained the stenographic transcript of the minmutes of the trial.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is granted, and the appeal is dismissed, without costs. (See *Bray v. Cox* 38 NY2d 350).

LAWRENCE, J.P., KUNZEMAN, RUBIN and EIBER, JJ., concur.

ENTER:

MARTIN H. BROWNSTEIN
Clerk

October 5, 1989 GETZ v. GETZ

APPENDIX 6

At an IAS Part of the Supreme Court of the State of New York, held in and for the County of Westchester, at the Courthouse, 111 Grove Street, White Plains, New York, on the 8th day of March, 1989

P R E S E N T :
Hon. Nicholas Colabella,
Justice

----------X

STANLEY GETZ, :

Plaintiff, : JUDGMENT

— against — :

: Index No.
13940/81

MONICA GETZ, :

Defendant. :

----------X

The plaintiff having brought this action for a judgment of divorce upon the grounds of cruel and inhuman treatment and adultery and for ancillary relief, and a jury verdict having been rendered on May 29, 1987, in favor of plaintiff upon both grounds of cruel and inhuman treatment and adultery; and judgment of divorce having been entered in favor of plaintiff, on October 6, 1987 upn the ground of defendant's cruel and inhuman treatment of plaintiff; and the Court having retained jurisdiction to determine the ancillary financial issues of equitable distribution, maintenance, arrears and counsel fees; and the ancillary matters having come on for trial before me, and the parties having appeared before me and presented their written and oral proof and the Court having made and filed its decision dated February 9, 1989;

NOW, on motion of COHEN and SHALLECK, attorneys for the plaintiff, it is

ORDERED AND ADJUDGED that the marital property shall be distributed as follows:

(a) From the gross sales price of the property known as Shadowbrook, in Irvington, New York (directed to be sold by order of this Court dated September 6, 1988) the parties shall pay

(i) the closing costs;

(ii) real estate taxes;

(iii) town and village charges;

(iv) the joint mortgage to First National City Bank dated August 1, 1966;

(v) the joint mortgage dated September 19, 1983 and judgment against defendant docketed June 9, 1982, to Chemical Bank;

(vi) the federal tax liens against plaintiff for 1980; and

(vii) the judgments docketed August 3, 1983 and August 10, 1984 against plaintiff and defendant to the New York State Tax Commission.

The net proceeds shall be divided equally between the parties. The remaining mortgage, lis pendens, judgments and liens shall be discharged or satisfied from the parties' net shares by the party incurring same except that responsibility for the judgment to ZOLT and LOOMIS, docketed September 16, 1987, shall be apportioned 75% to plaintiff and 25% to defendant.

(b) The 5,000 square meters of real property in Spain shall be placed on the market for sale within 45 days of the entry of this judgment. If the parties cannot agree on a sales price, the parties shall designate an appraiser to determine the sale price within thirty (30) days of the date of this judgment. If the parties cannot agree, an appraiser appointed by the Court shall set the sale price. At the closing, the parties shall pay, from the gross proceeds, (i) the closing costs, (ii) real estate taxes and (iii) municipal charges. The parties shall thereafter equally divide the net proceeds.

(c) All royalties for recordings made by plaintiff after November 8, 1956, and before February, 1981, shall be equally divided between the parties and disbursed directly to each party when paid; and it is further

ORDERED and ADJUDGED that, pending the sale of the Shadowbrook property, defendant shall continue to collect and apply the rents received as provided in the parties' February 11, 1982 so-ordered agreement; and it is further

ORDERED and ADJUDGED that, except as provided herein, all *pendente lite* orders, including the order of Hon. Matthew Coppola dated March 19, 1987 and filed on March 20, 1987, shall terminate upon entry of this judgment; and it is further

ORDERED and ADJUDGED that all royalties due from recordings made by plaintiff prior to the marriage and subsequent to the commencement of this action constitute the separate property of the plaintiff; and it is further

ORDERED and ADJUDGED that since defendant's request for maintenance has been withdrawn based upon plaintiff's deteriorating medical condition as presented by the testimony of plaintiff's physician and the Mayo Clinic medical records, the defendant is hereby granted leave to reopen this request upon a showing that the portrayal of plaintiff's condition has been materially inaccurate; and it is further

ORDERED that defendant, at her sole expense, may conduct a physical examination of plaintiff in California by a physician of her choice within 60 days of the entry of this judgment; and it is further

ORDERED and ADJUDGED that defendant's request for a judgment of arrears in temporary support allegedly due pursuant to the February 11, 1982 so-ordered agreement, be and the same is hereby denied; and it is further

ORDERED and ADJUDGED that defendant's request for counsel fees, costs and disbursements be and the same is hereby denied; and it is further

ORDERED and ADJUDGED that defendant's recrimination defense to plaintiff's second cause of action for adultery be and the same is hereby dismissed and plaintiff is granted leave to resettle the judgment of divorce rendered by this Court on October 6, 1987 so as to include the ground of adultery as an additional ground for the judgment heretofore rendered; and it is further

ORDERED and ADJUDGED that plaintiff's third cause of action for specific performance of the February 11, 1982 agreement be and the same is hereby dismissed as academic, based upon the order of this Court dated September 8, 1988, which order directed the sale of the Shadowbrook property.

ENTER

/s/ Hon. Nicholas Colabella

Justice of the Supreme Court
Hon. Nicholas Colabella
Supreme Court Justice

(3)

No. 90-562

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MONICA GETZ,

Petitioner,

vs.

STANLEY GETZ,

Respondent.

PETITIONER'S REPLY BRIEF

WHITNEY NORTH SEYMOUR, JR.
Attorney for Petitioner
100 Park Avenue, Room 2606
New York, New York 10017
(212) 599-0068

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MONICA GETZ,

Petitioner,

vs.

STANLEY GETZ,

Respondent.

PETITIONER'S REPLY BRIEF

Petitioner Monica Getz submits this reply to the brief of respondent, Stanley Getz, dated October 31, 1990, filed in opposition to her petition for certiorari to the Court of Appeals of the State of New York.

Respondent's Counterstatement of the Case

Respondent's long recital of the procedural delays and expenses in this protracted matrimonial litigation (Resp. Br. pp. 2-14) confirms petitioner's argument that matrimonial proceedings should

not be shunted to the commercial courts of New York State, where interminable procedural maneuverings are available to allow the spouse with the deepest pocket to bring the weaker spouse to her knees.

We will not burden the Court with a detailed refutation of the respondent's attempts to place the responsibility for delays on petitioner. That is unnecessary to establish the underlying point which is that *all* of the delays and expense of this type of proceeding deny equal protection to women as a class. The key fact on this issue is respondent's concession that when this matter was in the Family Court back in 1982:

> The parties entered into an "Agreement Toward Reconciliation" on February 11, 1982.
>
> (Resp. Br. p. 7)

That was *eight years ago*. The marital dispute at that point was well on its way to resolution. Then the *husband* decided to circumvent the agreement, which he did simply by filing this divorce action, thereby aborting the agreement and ousting the Family Court of jurisdiction.[1] That is when the delays and confrontational litigation began, spreading over eight years and resulting in the wife's liability for legal fees which will literally eat up the bulk of the proceeds from the sale of the family home if and when that occurs. That ability to force any wife into such a grotesque procedural morass is exactly why this petition should be granted.

* * *

A few particulars in the respondent's counterstatement of the case merit specific reply:

---

[1] Respondent's ability under New York law to transfer the marital dispute to a trial court of general jurisdiction and thereby defeat the jurisdiction of the specialized Family Court is the principal ground for petitioner's claim of denial of equal protection.

Petitioner's Financial Condition

You cannot eat real estate. The family home at Shadowbrook sounds impressive on paper but is an economic disaster in reality. "Cash flow" is the key to economic well-being. A wife, like anyone else, needs *cash* to go to a grocery store, to pay property taxes, to make repairs. Shadowbrook is not cash — it is a cash sponge. It demands cash for bare upkeep, and the cash is simply not there for anything else.[2] Mrs. Getz herself lives from hand to mouth.

The so-called "guest houses" referred to in respondent's brief are a garage and a caretaker's house, both rented out to tenants in order to provide income to cover insurance, maintenance and tax payments. The buildings are in violation of the local building code and Mrs. Getz is harried by building inspectors because she cannot pay the amounts necessary to comply with local ordinances.

Mrs. Getz operates the main house as a "bed-and-breakfast" but for approximately two years the furnace was broken and inoperable so that no one rented rooms except during the non-heating months. Even after attempted repair in December 1989, the heating system remains inadequate and unreliable.

What is missing in the wife's situation is support from respondent. While he gives concerts around the world at $25,000-plus per appearance, the wife receives not one cent toward the upkeep of the property which she strives to keep going as a family base for their children and grandchildren.

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[2] The "yearly income" of $133,000 asserted at page 6 of respondent's brief is mythical. The rental income from Shadowbrook *must* be applied to pay expenses, insurance and repairs under the trial court's decree. The royalty income must pay for current legal disbursements (such as the printing of this Reply). What remains is barely enough for subsistence. Monica Getz's financial distress is genuine.

Her 50% interest in the property is a fiction. She has over $600,000 in unpaid legal bills which will become liens on the proceeds from its sale.[3] The *lawyers* are the only ones who benefit from Shadowbrook. Under these circumstances, it is an albatross for petitioner. She cannot sell the property because it is under court order, and she cannot gain income from the property because of its present deteriorated condition. She is an economic prisoner, made so by the excesses of this litigation and the unequal workings of New York's divorce laws.

Respondent's Health

One cannot help but feel sympathy for anyone suffering from liver cancer, even when precipitated by alcohol, heroin and cocaine abuse, but the husband's state of health in this case cannot excuse his misuse of the unfair divorce laws of New York State to drive his wife to the wall financially, to destroy the family homestead, and to utilize judicial process to carry on a personal vendetta.[4] The husband continues to earn a six figure income and live a Malibu lifestyle, while the wife must fight for her survival against a legal juggernaut unleashed by his attorneys.

Status of Appeal

Respondent has jumbled together a whole series of petitioner's futile appeals in a transparent attempt to confuse the status of this case. The simple fact is that this petition involves the direct appeal from the final judgment in this case, which is printed as Appendix 6 to respondent's brief (Resp. Br. pp. A-7 - A-10). There is *no other appeal* pending from that judgment.

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[3] In addition, respondent has reportedly incurred legal bills of over $700,000 in this action, and by bringing the Supreme Court divorce proceeding, respondent has impoverished the Getz family.

[4] Respondent's brief concedes that after six years of these legal proceedings, a psychologist's report found that Mrs. Getz was suffering from "a probable chronic state of frustration, disenchantment, [and] stress." (Resp. Br. p. 13). Small wonder.

We readily acknowledge that petitioner's attempt to appeal from the original judgment of divorce (Appendix 1; Resp. Br. pp. A-1 - A-2) was dismissed because petitioner was unable to file the record on appeal, but what respondent fails to note is that the reason she was unable to file the record is that the official court reporter, paid $9,000 for the transcript in advance, failed to deliver a complete and accurate trial transcript.

It is also true that the trial judge subsequently denied a motion for a new trial *based on newly discovered evidence*, and that an appeal from that denial is pending. But that does not affect the finality of the judgment involved here, nor the legal grounds upon which it was based. This proceeding presents the one and only opportunity to address the issues presented in the petition for certiorari.

POINT I

PETITIONER DOES NOT CHALLENGE NEW YORK'S EQUITABLE DISTRIBUTION STATUTE, BUT NEW YORK'S COMMERCIAL FORUM FOR DIVORCE PROCEEDINGS

The first of respondent's "Reasons Why the Writ Should be Denied" raises new legal issues which can be disposed of briefly in this reply.

Respondent mischaracterizes the petition as an "attack on the constitutionality" of New York's Equitable Distribution Statute and counters that the

> Equitable Distribution Law. . . [has] removed the sexual discrimination that was express or implied in New York statutes relating to alimony and support. (Resp. Br. p. 15)

This assertion is not only questionable (see *infra*), but it also misses the entire point of the petition that "New York's present statute authorizing husbands to initiate plenary divorce proceedings in the state's principal commercial court [Domestic Relations Law § 170] is a denial of due process and equal protection to women." (Petition, p. 11).

Domestic Relations Law § 170 has an intentionally disproportionate and discriminatory impact on women as a class who, because of the social, political, and economic burdens historically placed upon them, cannot afford the ruinously high cost of seeking justice in New York's State Supreme Court – the principal court for commercial disputes.

Petitioner does not attack the equitable distribution guidelines themselves but instead challenges the fact that, *to the clearly foreseeable detriment of women*, these guidelines (as well as all other substantive aspects of New York's divorce law) are applied in the "arena of full-blown commercial litigation" – a court of general jurisdiction where the disparity in resources between men and women puts women at a severe disadvantage, amounting to a *denial* of equal protection and due process.

Furthermore, respondent's argument that the Equitable Distribution Law, as applied, has not resulted in hardship to women is directly contradicted by findings in the Report of the "New York Task Force on Women in the Courts," set forth in the petition. (Petition, pp. 12-14). The report recognized that "[t]he manner in which judges distribute a family's assets and income upon divorce profoundly affects many women's economic welfare." Despite this fact, the Task Force expressly found that "many lower court judges have demonstrated a predisposition not to recognize or to minimize the contribution of the homemaker wife to the marital economic partnership in distributing marital property." Thus, though the words of the New York statute may be gender neutral, its effects are terribly burdensome on, and discriminatory toward, women.

POINT II

RESPONDENT HAS FOCUSED ON THE WRONG APPEAL

Respondent's brief (Point II, p. 16) incorrectly addresses the appeal from the judgment granting divorce of October 7, 1987, which was dismissed because there was no complete record on appeal available. This petition, on the other hand, challenges the due process and equal protection deprivations caused by a

different appeal — the Appellate Division's summary dismissal dated December 7, 1989 of Mrs. Getz's appeal from the final judgment of March 10, 1989 awarding equitable distribution and dismissing her recrimination defense, followed by the New York State Court of Appeals' order of July 2, 1990 denying petitioner's motion for leave to appeal that summary dismissal.

POINT III

THE PETITION ANTICIPATED ARGUMENTS IN POINT III (pp. 17-18) OF RESPONDENT'S BRIEF

We respectfully refer the Court to pages 21 to 24 of the Petition where we address each of the arguments in Point III of Respondent's Brief.

POINT IV

FINALITY OF DIVORCE DECREE

Respondent's repeated claim that this petition does not relate to a final judgment in his divorce action is incorrect. The March 1989 judgment sought to be reviewed does not contemplate further discretionary action at the trial level. Its finality is beyond dispute.

The presently pending appeal in the Appellate Division in New York is from the denial of a motion for a new trial *based on newly discovered evidence.* It is not an appeal in the main action itself. It is an independent post-judgment proceeding which does not in any way affect the finality of the judgment which it seeks to set aside. If in the remote chance it should prove successful, it will not undo the denial of constitutional rights which is the basis for this petition, but will merely require a retrial based on the false testimony of one of the trial witnesses. The unfair legal principles which this petition attacks will remain undisturbed *unless this Court grants certiorari. Cox Broadcasting v. Cohn*, 420 U.S. 469, 480 (1985); *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 907, n. 2 (1982) (First Amendment ruling deemed final, despite remand for a recomputation of damages).

CONCLUSION

Accordingly, we pray that the petition for certiorari be granted.

Dated: New York, New York
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Respectfully submitted,

WHITNEY NORTH SEYMOUR, JR.
Attorney for Petitioner
100 Park Avenue, Room 2606
New York, New York 10017
(212) 599-0068

ALAN D. SCHEINKMAN
CRAIG A. LANDY
PETER JAMES CLINES
BROWN & SEYMOUR
Of Counsel